

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )

Federal-State Joint Board )  
On Universal Service )

CC Docket No. 96-45 /

Western Wireless Corporation )  
Petition for Designation as an )  
Eligible Telecommunications Carrier for the )  
Pine Ridge Reservation in South Dakota )

DA 01-278

**COMMENTS OF  
 GREAT PLAINS COMMUNICATIONS, INC.**

Great Plains Communications, Inc., ("Great Plains") by counsel, files these comments on the Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota ("Petition") in accordance with the Commission's Public Notice Released February 2, 2001, DA 01-278. Because the Commission lacks jurisdiction to act on the Petition, because grant of the Petition would violate Section 214(e) of the Communications Act, and because Western Wireless has not demonstrated that the Public Interest would be served by designation of a second Eligible Telecommunications Carrier in the service areas of the Rural Telephone Companies involved, the Petition should be dismissed.

**I. GREAT PLAINS' SERVICE TO THE PINE RIDGE RESERVATION**

Great Plains has provided high-quality telecommunications service, including universal service, to customers in its service area on the Pine Ridge Reservation ("Reservation") in South Dakota since acquiring this property as part of the acquisition of the Gordon exchange from US West on January 1, 1997.<sup>1</sup> The majority of the Gordon exchange is located in Nebraska. This

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<sup>1</sup> Great Plains' operation on the Reservation complies with South Dakota Public Utilities Commission ("PUC") regulations. Great Plains was designated an ETC in South Dakota

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exchange encompasses a total of 1,370 square miles; 185 square miles are on Reservation land in the southern part of the Reservation adjacent to the South Dakota/Nebraska state border. Great Plains currently serves approximately 121 subscriber lines on the Reservation. Although it is extremely difficult to determine exactly what percentage of occupied dwelling units subscribe to service, Great Plains estimates that approximately 70% of the occupied dwellings subscribe to telephone service in its area, substantially above the 50% level stated in the Petition.<sup>2</sup> Service is available at all known inhabited dwellings and there are no held orders for service.

Great Plains provides telecommunications service to the Batesland School, which serves children from the Reservation in grades K-8 in Batesland, South Dakota, as part of the Shannon County School District. Great Plains has worked with Batesland School personnel on the school's e-rate discount applications. The school qualified for 90 percent e-rate discounts both in 1999-2000 and 2000-01, the maximum allowed under the federal program.

Great Plains also provides Lifeline and Link-up service to eligible low-income customers on the Reservation pursuant to Section 54.405 of the Telecommunications Act. Beginning in fall 2000, Great Plains began offering Lifeline support to eligible residents of tribal lands as defined in 47 C.F.R. Section 54.400(e), whereby recipients receive up to \$25 per month for support of basic local residential service and are only required to pay \$1 per month for the service. Great Plains has promoted the program through bill inserts, public notices in various locations, and telephone

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on December 17, 1997.

<sup>2</sup> Petition at 3, n. 3; 27. There are approximately 172 known dwellings within the Great Plains service area on the Reservation.

directory advertisements.

Since acquiring the Gordon exchange, Great Plains has upgraded the telecommunications plant on the Reservation in order to improve service and reliability. The most significant improvements have included installation of a digital loop carrier transmission system in 1998. This upgrade has particularly improved voice and data transmission quality and provided necessary capacity to accommodate the traffic between this portion of the Reservation and the Great Plains central office switch in Gordon, Nebraska. Great Plains also offers toll-free dial-up Internet service through its NetLink subsidiary to customers on the Reservation. Numerous customers in the area utilize this service. Great Plains is also studying the viability of offering broadband Internet service to the Reservation. The Reservation is part of Great Plains' single company-wide study area. Great Plains operates small portions of similar exchanges in Kansas and Colorado, which also overlap the Nebraska border.

## **II THE COMMISSION LACKS JURISDICTION TO ACT ON THE PETITION**

### **A. Western Wireless Has Not Shown that the South Dakota PUC Lacks Jurisdiction to Grant ETC Designation.**

#### **1. The Commission Has Previously Rejected a Challenge to the South Dakota PUC's Jurisdiction on Reservations.**

In the *Twelfth Report and Order* the Commission dismissed the petition of the Cheyenne River Sioux Tribe Telephone Authority ("CRST") which requested either ETC designation by the Commission or affirmation of the previous designation order of the South Dakota PUC.<sup>3</sup> The

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<sup>3</sup> Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, *Twelfth Report and Order*, 15 FCC Rcd 12208, 12276 (2000). ("Twelfth Report and Order")

PUC asserted it had authority to issue the designation to CRST and the Commission found “no reason before us to disturb” that designation. A finding that the PUC has no jurisdiction over Western Wireless would therefore conflict with the *Twelfth Report and Order*.

2. Western Wireless Is Precluded From Applying to the Commission Because Its ETC Designation is Pending in South Dakota.

The *Twelfth Report and Order* specified that in order to avoid “forum shopping” a carrier may only apply to the Commission for designation under Section 214(e)(6) “when it has not initiated a designation proceeding before the affected state commission.”<sup>4</sup> Western Wireless attempts to shop this forum anyway by claiming that the pending South Dakota request is “completely distinct and separate” from the current one before this Commission.<sup>5</sup> Whatever differences may exist between the service offering proposed to the PUC and that before this Commission are entirely irrelevant to ETC designation. Either the requirements to offer and advertise the supported services are met or they are not. The addition of additional services or agreements with the tribal government does not change in anyway the question of whether the offering is consistent with minimum requirements of the Act and the Commission’s Rules.

3. Western Wireless Has Not Met Its Burden Of Showing That It Is Not Subject To The Jurisdiction Of the South Dakota PUC

The *Twelfth Report and Order* emphasized that a carrier seeking a Section 214(e)(6) designation bears a “strict” burden to demonstrate the lack of state commission jurisdiction, for

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<sup>4</sup> Id. at 12268-69.

<sup>5</sup> Petition at 17-19.

which generalized assertions will not suffice.<sup>6</sup> This burden is especially relevant in South Dakota where Western Wireless has pending an application with the state to serve the same areas. If Western Wireless really believed the PUC does not have jurisdiction on the Pine Ridge or other reservations in the state, it would have withdrawn those areas from consideration.<sup>7</sup> As noted above, the Commission has chosen not to disturb the PUC's assertion of authority over a tribal company, which necessarily implies that there is an even higher burden to demonstrate that the PUC lacks jurisdiction over a non-tribal carrier.

Western Wireless relies on its Jurisdictional Supplement in the Crow Reservation proceeding for its claim that the Commission should determine jurisdiction based on a balancing of the interests of the tribal, federal and state governments.<sup>8</sup> As was shown by other parties to that proceeding, however, the Commission does not have authority to "balance" these interests, but must find specifically a lack of state jurisdiction through a "particularized" inquiry.<sup>9</sup> Apparently recognizing that such inquiry must begin with determining whether there are governing Acts of Congress, Western Wireless points to the "absolute" jurisdiction phrase in the South Dakota Enabling Act.<sup>10</sup> The term "absolute" as used in the Enabling Act does not mean "exclusive"

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<sup>6</sup> *Twelfth Report and Order* at 12267.

<sup>7</sup> Western Wireless has accepted designation in Kansas, Minnesota, Nebraska and perhaps other states for a service area which includes reservations.

<sup>8</sup> Petition at 8-17 and Appendix F.

<sup>9</sup> Great Plains incorporates by reference, to the extent relevant to South Dakota, the November 24, 2000 Comments of Project Telephone Company and Range Telephone Cooperative Regarding Western Wireless' Jurisdictional Supplement in the Crow Reservation proceeding.

<sup>10</sup> Petition at 12.

jurisdiction.<sup>11</sup> If the Enabling Act actually had such effect, then it follows that the state would also have no jurisdiction over any service of the incumbent local exchange carriers on reservations and the Commission's previous deference to the South Dakota PUC and other commissions would be in error.

Even assuming, *arguendo*, the Commission should apply a balancing test, there are no cognizable federal or tribal interests impaired by state determination of ETC status. Because the specific federal legislation presumes that state commissions will decide ETC status, there cannot be a federal interest in preempting that jurisdiction because the state interest is consistent, not incompatible with the federal plan for ETC designation.<sup>12</sup> Lack of state jurisdiction would not benefit tribal sovereignty because the Commission, not the tribal government, would then act on the application.<sup>13</sup>

Western Wireless may well assert that there is a tribal interest in implementing the agreement between it and the tribe, but it has not shown that the implementation would be prevented by having the PUC consider its ETC status, or even that ETC status is necessary to

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<sup>11</sup> *Kake Village v. Egan*, 369 U.S. 60, 68 (1962).

<sup>12</sup> State designation of ETC status is thus very different from the state activities which have been found to conflict with federal programs. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

<sup>13</sup> State, instead of FCC, designation of ETC status does not implicate the right of the tribe "to make its own laws and be governed by them," it only determines whether carriers will receive federal (and possibly state) universal service support. *See, Williams v. Lee*, 358 U.S. 217, 220 (1959). In any event, tribal sovereignty is not an independent basis for preemption of state law, but a "backdrop against which the applicable treaties and federal statutes must be read." *Rice v. Rehner*, 463 U.S. 713, 719 (1983).

implement the agreement. Western Wireless' description of its success in initiating service and signing up customers is evidence that ETC designation is not necessary.<sup>14</sup>

**B. The Commission Lacks Authority to Designate Western Wireless as an ETC in a Portion of Great Plains Study Area.**

As described in I, above, Great Plains is a single study area carrier, with the majority of its access lines in Nebraska, but a few in South Dakota, Colorado and Kansas. Section 214(e)(1)(2) and (5) of the Communications Act, in combination, require that the service area of a second ETC must include the entire study area of a rural telephone company, unless and until specified procedures are followed by the state, the Commission and a joint-board.<sup>15</sup> Despite these unambiguous requirements, the Commission has nevertheless adopted an order designating Western Wireless for portions of the study areas of Rural Telephone Companies in Wyoming. Great Plains adopts and incorporates by reference the Petitions for Reconsideration of that decision.<sup>16</sup>

**III WESTERN WIRELESS HAS NOT ESTABLISHED THAT THE PUBLIC INTEREST WILL BE SERVED BY DESIGNATING IT AN ETC IN THE AREA OF THE RURAL TELEPHONE COMPANIES**

Section 214(e)(6) requires that "Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall

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<sup>14</sup> Petition at 4.

<sup>15</sup> 47 U.S.C. 214(e)(1), (2), (5).

<sup>16</sup> Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, *Memorandum Opinion and Order*, rel. Dec. 26, 2000, DA 00-2896. (Recon. pend.).

find that the designation is in the public interest.”<sup>17</sup> Western Wireless asserts the public interest will be served by a grant of ETC status in the service area of the Rural Telephone Companies, but nowhere in its petition does Western Wireless discuss the potential impact of ETC designation on the incumbent Rural Telephone Companies’ ability to continue to provide the high quality service that they have historically.

Nor is there any showing, much less proof, that ETC designation is necessary for the provision of the service. The fact that the incumbents have high cost of service which requires support in order to maintain reasonable local rates says nothing about the costs of providing the very different, and more limited service which Western Wireless proposes.

Moreover, each of the purported benefits is stated in vague general terms without any indication that a specific improvement is promised in regard to a particular incumbent’s service. The fact that a second carrier will offer a competitive service cannot, by itself, satisfy the public interest requirement, because the requirement would then not be required in the statute. In this regard, Great Plains service provides significantly higher speed data connections, making Internet access much more useful. The supposed mobility advantage is largely illusory because the size, weight and awkwardness of using the equipment for mobile service necessarily means that it will not “ordinarily” be used for such purposes.<sup>18</sup>

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<sup>17</sup> 47 U.S.C. 214(e)(6).

<sup>18</sup> Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service, November 3, 2000, WT-00-239.




#### IV. CONCLUSION

The Commission has correctly recognized that the threshold question in any application for designation as an eligible telecommunications carrier is whether the state commission lacks jurisdiction. Western Wireless has not established that the South Dakota Public Utilities Commission lacks jurisdiction; the Commission has previously sustained a designation by the PUC of a tribal carrier on its own reservation, and a Western Wireless application for designation in the same area is pending before the South Dakota courts. Even if the Commission has jurisdiction, the statute does not permit designation of a second ETC in a portion of the study area of a Rural Telephone Company. Finally, Western Wireless has not shown that the Public Interest will be served by designation in the services areas of the Rural Telephone Companies involved. The Petition should, therefore, be dismissed.

Respectfully submitted

Great Plains Communications

By



David Cosson  
Its Attorney

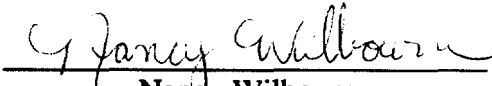
Kraskin, Lesse & Cosson, LLP  
2120 L St. N.W., Suite 520  
Washington, D.C. 20037

(202)296-8890

March 12, 2001

## **CERTIFICATE OF SERVICE**

I, Nancy Wilbourn, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Comments of Great Plains Communications, Inc." was served on this 12<sup>th</sup> day of March, 2001 by first class, U.S. mail, postage prepaid or by hand delivery to the following parties:

  
Nancy Wilbourn

Michael K. Powell, Chairman \*  
Federal Communications Commission  
445 12th Street, SW, 8th Floor  
Washington, DC 20554

Susan Ness, Commissioner \*  
Federal Communications Commission  
445 12th Street, SW, 8th Floor  
Washington, DC 20554

Harold Furchtgott-Roth, Commissioner \*  
Federal Communications Commission  
445 12th Street, SW, 8th Floor  
Washington, DC 20554

Gloria Tristani, Commissioner \*  
Federal Communications Commission  
445 12th Street, SW, 8th Floor  
Washington, DC 20554

Dorothy Attwood, Chief \*  
Common Carrier Bureau  
Federal Communications Commission  
445 12th Street, SW, Room 8-B201  
Washington, DC 20554

Linda Kinney, Legal Advisor \*  
Office of Commissioner Susan Ness  
Federal Communications Commission  
445 12th Street, SW, Room 8-B115  
Washington, DC 20554

Rebecca Beynon, Legal Advisor \*  
Office of Commissioner  
Harold Furchtgott-Roth  
Federal Communications Commission  
445 12th Street, SW, Room 8-A302  
Washington, DC 20554

Kyle D. Dixon, Legal Advisor \*  
Office of Chairman Michael K. Powell  
Federal Communications Commission  
445 12th Street, SW, Room 8-A204  
Washington, DC 20554

Carol E. Matthey, Deputy Chief \*  
Common Carrier Bureau  
Federal Communications Commission  
445 12th Street, SW, Room 5-C451  
Washington, DC 20554

Katherine Schroder, Chief \*  
Accounting Policy Division  
Common Carrier Bureau  
Federal Communications Commission  
445 12th Street, SW, Room 5-A426  
Washington, DC 20554

Michele C. Farquhar  
David L. Sieradzki  
Ronnie London  
Hogan & Hartson, LLP, Columbia Square  
555 13<sup>th</sup> Street, NW  
Washington, DC 20004-1109  
Counsel for Western Wireless Corporation

Gene DeJordy  
Executive Director of Regulatory Affairs  
Western Wireless Corporation  
3650 131<sup>st</sup> Avenue, SE, Suite 400  
Bellevue, WA 98006

Sheryl Todd (3 copies) \*  
Accounting Policy Division  
Common Carrier Bureau  
445 12<sup>th</sup> Street, SW, Room 5-B540  
Federal Communications Commission  
Washington, DC 20554

International Transcription Service \*  
(diskette)  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

\* Via Hand Delivery